IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12251 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STERLITE INDUSTRIES (INDIA) LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA THR' SECRETARY & 3 - Respondent(s)

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Appearance :
MS AMRITA M THAKORE WITH MR.MIHIR JOSHI, SENIOR ADVOCATE for Petitioner No(s).: 1,2.
NOTICE SERVED for Respondent No(s).: 1.
MR JITENDRA MALKAN for Respondent No(s).: 1.
NOTICE NOT RECD BACK for Respondent No(s).: 2, 3,4.

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HONOURABLE MR.JUSTICE D.A.MEHTA

CORAM :

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 12/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This petition under Article 226 of the Constitution of India seeks a writ of mandamus directing the respondents to forthwith refund the amount of Rs.44,20,58,831/- to the petitioner and consequential relief as may be appropriate.

2 The brief facts are that on 31/3/2003 the petitioner had filed two refund claims for Rs.18,17,67,645/- and Rs.52,54,06,510/-, since the petitioner was not in a position to utilise the credit of duty paid on inputs on account of the fact that finished goods were exported under bond. In the first round of appeals before the Commissioner

(Appeals)and then Customs, Excise and Service Tax Appellate Tribunal (CESTAT), against the order of rejection by respondent Nos.3 and 4, the matter was remanded by CESTAT to Commissioner (Appeals) to factually verify whether the refund of accumulated credit claimed by the petitioner was attributable to the export of goods under bond alone or was relatable to any other exports.

3 In compliance with the directions of CESTAT, the Commissioner (Appeals) made an order on 5/11/2004. As can be seen from the order of Commissioner (Appeals), after calling upon the petitioner to furnish various details, the said details were forwarded to the Jurisdictional Assistant Commissioner for verification. In paragraph No.3 of the order of Commissioner (Appeals) detailed reference is made to the correspondence which ensued between him and the Jurisdictional Assistant Commissioner on one side and the petitioner and the Commissioner (Appeals) on the other side. After taking into consideration the report of

Jurisdictional Assistant Commissioner, the Commissioner (Appeals) has recorded “From the above, it is clear that there cannot be any dispute for refund of Cenvat credit attributable to inputs used in the manufacture of finished goods exported under bond upto the extent of Rs.65,79,35,635/-. The appellant has intimated that presently they have the balance of unutilized cenvat credit of Rs.44,20,58,831/-. The Jurisdictional Assistant Commissioner is directed to ascertain the correctness of above figure lying as balance and allow the refund of the same under Rule 57 AC(7) of Central Excise Rules,1944 accordingly”.

4 It is an admitted fact, as per affidavit-in-reply dated 27/7/2005 sworn by one Shri S.Raja, Assistant Commissioner of Central Excise and Customs, Div.III, Silvasa, that the order of Commissioner (Appeals) dated 5/11/2004 was challenged by way of appeal before the CESTAT. The appeal was accompanied by an application seeking stay of the order viz, granting of refund. The said

Stay Application came to be rejected on 4/2/2005. The present petition has been filed on 14/6/2005.

5 Heard Ms.Amrita M.Thakore, learned Advocate appearing with Mr.Mihir Joshi, Senior Counsel. Reiterating the aforesaid facts with added emphasis, it was submitted by Ms.Thakore that the entire approach of the respondent authorities was unwarranted on facts and in law. That the refund claims were filed on 31/1/2003 viz., two years prior to moving this Court and as directed by CESTAT in the first round on 10.9.2004 the petitioner has got the facts verified before Commissioner (Appeals). The entitlement to refund has been accepted by Jurisdictional Assistant Commissioner vide his report tendered before the Commissioner (Appeals). In these circumstances, the petitioner having succeeded, coupled with the fact that the stay application moved by respondent authorities before the Tribunal stands rejected, the petitioner is entitled to refund forthwith in light of circulars issued by Central Board of Excise and

Customs which are annexed at Annexure-F. Ms.Thakore therefore urged that in the circumstances the petition be granted awarding costs to the petitioner.

6 Mr.Jitendra Malkan, learned Counsel appearing on behalf of the respondent authorities submitted that there was no dispute as to the facts stated, however, in light of statutory provisions of Section 11BB and Explanation thereunder of the Central Excise Act,1944 (the Act), even if the refund was granted belatedly, the petitioner would be entitled to claim interest as per the said statutory provision and hence no prejudice would be caused to the petitioner if refund is not directed to be granted forthwith. Inviting attention to the averment made in the affidavit-in-reply, that the departmental appeal has also been dismissed by the Tribunal on 19/7/2005, it was submitted that the department had statutory period of limitation for taking appropriate remedial action against the said order and hence, even on this count, no relief should be

granted by exercising jurisdiction under Article 226 of the Constitution. That the order of Commissioner (Appeals) had merged with the order of CESTAT and in the circumstances, the claim made by the petitioner was premature having been pressed into service within a month of passing of the order by CESTAT. He, therefore, urged that in these circumstances, this Court should not exercise extraordinary jurisdiction and the parties must be left to avail statutory remedies available to each of them under the provisions of the Act.

7 Having heard the matter at length and considering the fact that the issue involved is very limited the matter is taken up for final hearing and disposal. Rule returnable today. Mr.Jitendra Malkan waives service of Rule.

8 It is necessary to take note of the fact that the petition is moved claiming refund on the basis of an order made by Commissioner (Appeals) on 5/11/2004, and not on the basis of order dated

19/7/2005 passed by the Tribunal. The petitioner moved the Court only after the application for stay filed by the revenue before the Tribunal was rejected on 4/2/2005. On merits, at this juncture the Court is not required to enter into any exercise as to whether or not the refund has rightly been ordered to be made by the appellate authority. That stage has gone. Merits of the controversy had been decided by Commissioner (Appeals) in his order dated 9.1.2004 (Annexure A). Suffice it to state as recorded by the Commissioner (Appeals), the Jurisdictional Assistant Commissioner has verified the facts and it is in light of the report tendered by the Jurisdictional Assistant Commissioner that the Commissioner (Appeals) has passed an order on 5/11/2004 granting refund. In these circumstances, though academically, an appeal would lie against order of the Tribunal, or any other remedy may be available to the department, the factum of the Jurisdictional Assistant Commissioner having carried out the verification and accepted, that on facts, the petitioner is entitled to the refund, it does not

lie in the mouth of the respondent authorities to dispute the claim.

9 The contention raised on behalf of the revenue based on provisions of section 11BB of the Act cannot carry the case of revenue any further. The said provision stipulates that in a case where the duty has been ordered to be refunded under section 11B(2) of the Act and the refund is not made within three months from the date of receipt of the application under section 11B(1) of the Act, an assessee would become entitled to interest at the prescribed rates. The specious plea that delay of refund would permit the petitioner to claim interest loses sight of the basic Scheme of the Act. Once the refund is directed to be ordered by the competent authority in proceedings initiated in accordance with law, the subordinate authority is not supposed to hold back the refund for the simple reason that even on commercial basis if moneys, which do not belong to the revenue, are retained, interest becomes payable. The period of three months stipulated under

section 11BB of the Act is provided to ensure that the administrative exigencies are met with and any delay thereafter would result in revenue being required to pay interest. There is another aspect of the matter. This also imposes salutary check on recalcitrant officers who are not inclined to discharge their duties within reasonable time as provided under the Act. Reference to Explanation to section 11BB of the Act on behalf of the respondent authorities is not warranted as the said provision operates in entirely different context. Thus, an enabling provision for interest cannot be pressed into service to deny a legitimate claim of refund.

10 The issue requires to be considered from a slightly different perspective. Whenever the Revenue is called upon to pay interest, the same becomes payable by the government from the taxes collected from the citizens of this country. In a given case, like the present one, where the facts are stark and glaring, the Revenue cannot shirk its duty by referring to the provision which enables payment of

interest on delayed refunds, because ultimately, as a consequence thereof, it is the tax payers who are called upon to make payments for the failure, or lack of will / intention on part of the officer concerned to discharge his duty in accordance with law.

11 The last contention regarding merger of the order of Commissioner (Appeals) with that of the Tribunal does not merit acceptance, for the simple reason that all that has happened is that the order of Commissioner (Appeals) stands confirmed. It is necessary to note that at no stage the operation of the said order made by Commissioner (Appeals) was stayed by any higher forum including the Tribunal. The order was, therefore, operative all throughout and the petition had been moved on the basis of the said order.

12 Even if the Revenue challenges the order of the Tribunal in accordance with the remedies that may be available to it under law, in the first instance, in light of the facts available on record there is no

warrant to state that the Revenue will succeed. However, in the event of the Revenue ultimately succeeding in the matter, it is always open to the Revenue to effect recovery with interest in accordance with the statutory scheme under the Act.

13 As to what is the legal effect of an order of a higher forum has been elaborately laid down by this Court recently in a judgment rendered on 18th March 2005 in case of Milcent Appliances Pvt.Ltd. v. Union of India, in Special Civil Application No.16067 of 2004, by applying the decisions of the Apex Court in case of Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal, (1960) 40 ITR 618, and Union of India v. Kamlakshi Finance Corporation Ltd., 1991 (55) E.L.T. 433 (S.C.). Suffice it to state that the principles of judicial discipline require that the orders of higher authority are required to be followed unreservedly by the subordinate authority; even if an appeal is filed, it cannot furnish a ground for not following the order of the superior forum unless the operation of the order has been

stayed by a competent higher forum.

14 Vide Circular No.572/9/2001-CX dated 22.2.2001 (from F.No.201/20/2000-CX 6) issued by Central Board of Excise and Customs this is what is stated in cases where refund arises due to order of Commissioner (Appeals)

> "(3) The case where refund arises due to order of Commissioner (Appeals) or Commissioner of Central Excise/Customs and decision is taken to contest them before CEGAT.
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> In such cases appeal/stay application should be filed expeditiously well before the expiry of stipulated period of three months (and not waiting for the last date of filing of appeal). However, no refund/rebate claim should be withheld on the ground that an appeal has been filed against the order giving the relief, unless stay order has been obtained. It would be the responsibility of the concerned Commissioner to obtain stay order expeditiously where the orders passed by Commissioner

(Appeals) suffer from serious infirmities and it involves grant of heavy refunds".

Hence, the case of the petitioner also stands governed by the aforesaid circular issued by CBEC, revenue's attempt to obtain stay from CESTAT having failed.

15 In these circumstances, the Revenue having not made out any case for withholding the refund as directed by the Commissioner (Appeals) vide his order dated 05/11/2004, the petitioner is entitled to succeed. Accordingly, respondent Nos.2, 3 and 4 are hereby directed to refund the amount of Rs.44,20,58,831/- with interest as may be admissible in law within a period of four weeks from today. The petition is allowed accordingly. Rule made absolute. There shall be no order as to costs.

16. At this stage a request is made on behalf of the respondents to stay the operation of this judgment and order. In light of the facts which have come on

record the request is rejected.

Direct service is permitted.

[D.A. MEHTA, J]

[H.N. DEVANI, J]

m.m.bhatt